Oleniak v Slaton
2014 NY Slip Op 31345(U)
May 21, 2014
Sup Ct, New York County
Docket Number: 153239/13
Judge: Shlomo S. Hagler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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VINCENT OLENIAK,

Plaintiff,

Index No. 153239/13

-against-

PAMELA SLATON, SAMANTHA MARSHALL, HOLTZBRINCK PUBLISHERS, LLC, MACMILLAN PUBLISHERS, INC. and ST. MARTINS PRESS, LLC,

DECISION/ORDER

Defendants.

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HON. SHLOMO S. HAGLER, J.S.C.:

In this defamation action, plaintiff Vincent Oleniak ("plaintiff" or "Oleniak") seeks damages for written statements made by defendants Pamela Slaton ("Slaton") and Samantha Marshall ("Marshall") in their book, *"Reunited: An Investigative Genealogist Unlocks Some of Life's Greatest Family Mysteries*" (the "Book"). Defendants Holtzbrinck Publishers, LLC, MacMillan Publishers, Inc. and St. Martin's Press, LLC published the Book.

Plaintiff alleges three (3) causes of action for libel against defendants in his First Amended Complaint. Instead of interposing an answer, defendants now move to dismiss the First Amended Complaint for failure to state a cause of action pursuant to CPLR § 3211(a)(7).

Factual Background

Slaton is an "investigative genealogist" who assists adoptees in locating their birth parents. Slaton herself was adopted, and the Book, in part, is an autobiography of her efforts to track down her biological father, an individual the authors in the Book identify as "Vinnie." (Exhibit "B" to the Affirmation of Robert D. Balin, Esq., dated July 15, 2013 [Balin Aff.], Book, at 145).

Plaintiff admits that he had a relationship with Slaton's biological mother and he developed a personal relationship with Slaton. (First Amended Complaint ¶ 2). Plaintiff "never married" and acknowledged that he has "a son Vincent Jr. aged 28 at the time of the writing of the Book who Vinnie took care of." (*Id.*, ¶ 23).

The alleged defamatory statements are contained in Chapter 8 of the Book, which is titled "Vinnie on the Corner," as follows:

1. "I called the agency that handled my adoption and read them the riot act. . . . They assured me that they had already told me as much as they knew, and that the information was accurate. My birth father's first name was Vinnie, and, coincidentally, given my adoptive father's profession as an undertaker, he worked in the Bronx as a mortician." (*Id.*)

2. ". . . she tracked him down, and half an hour later I got the call.
"'This is Big Vinnie. I hear you're lookin' for me.'
"I thought to myself, God, *if my birth mother wasn't bad enough, now I have the mob on the line.*" *(Id.*, at 145-146) (emphasis in original).

3. "'Hi Vinnie. I don't know how to tell you this. . . .'
"'Just lay it on the line, sweetheart.'
"'Well, my birth mother's name is Priscilla and—'
"'Cupcake, I know who you are. You're my daughter.
You were born on my birthday.'" *(Id.*, at 146).

4. "I asked to see some pictures of Priscilla when she was young. . . . He went into the other room and brought out an old shoe box. It was full of pictures . . . of various women. There must have been hundreds in there. Vinnie was such a player. For a moment, I felt sorry for Priscilla. She was one in a string of Vinnie's conquests." *(Id.*)

5. "Vinnie never married. He was one of these guys who could never commit. And yet he did do right by his son, Vincent, another child he had out of wedlock (I am assuming there are only three of us)." *(Id.*, at 147).

6. "No, it wasn't the ideal father-daughter reunion." *(Id.*, at 148).

7. "But it was what I needed at the time. It was such a relief to know the sordid story my birth mother told me wasn't true, and confirmation that Priscilla was a truly

sick woman. When I found out the real story, I was irate. As soon as I got home, I called Priscilla." "'Guess what I found out. I met my birth father. He told me everything.'"[1] *(Id.)*

8. "My lifelong search for my birth mother ended in spectacular failure. It was not the happy ending that 90 percent of my clients get to experience. But at least it gave me a relationship with my birth father, sort of." *(Id.)*

9. "We [Slaton and Vinnie] spoke sporadically over the years, but when Vinnie tried to express any kind of paternal affection, it made me uneasy. Whenever he'd say 'I love you, sweatheart,' I would literally squirm." *(Id.*, at 149).

10. "And then there were times when Vinnie would be completely inappropriate. He had a tendency to make tasteless remarks, which made the hairs on the back of my neck stand up. . . . He could be very sweet, protective, and paternal one minute, and creepy and cavalier the next." *(Id.)*

11. "Besides being grotesquely off-color sometimes, Vinnie started backpedaling a little on whether or not I was actually his biological daughter. He said he simply couldn't say for sure." *(Id.)*

12. "He's all about feeding the ones he loves—another sign we are related." *(Id.*, at 150).

13. "According to the [DNA] test, I had the DNA of a man and Vinnie had the DNA of a woman." *(Id)*.

14. "We may not be living out the father-daughter fairy tale, but it matters to me that he exists." *(Id.*, at 156.)

15. "I still don't know exactly where my birth father fits into my life. It's something adoptees struggle with for years. I just hope Vinnie sticks around long enough for me to figure it out." *(Id.)*

These 15 defamatory statements are alleged in paragraphs 22 (a) - (o) of the First Amended Complaint. Plaintiff claims that he is the "Vinnie" identified in the Book. (First Amended Complaint, ¶ 23).

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[1] In the Book, Slaton claims that her biological mother is "Priscilla," and that Priscilla and Slaton share the same father. *(Id.*, at 2).

Motion to Dismiss

In determining a motion to dismiss a pleading for failure to state a cause of action, the court must "accept the facts as alleged in the Complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Nonnon v City of New York*, 9 NY3d 825 [2007].) In a defamation action, the court must determine if the alleged defamatory statements are not actionable as a matter of law. (*Steinhilber v Alphonse*, 68 NY2d 283 [1986].)

Arguments

Plaintiff claims that the statements in the Book are false and defamatory because he is not Slaton's father and has not acknowledged paternity. In addition, plaintiff alleges, in part, that the Book creates the false impression that he: (1) was in the "mob" or the "mafia" (*Id.*, ¶ 22[d] and 27); (2) was "sexually promiscuous and fathering numerous children whom he did not care for"; (3) "discriminated against Slaton" [by] electing to care for 'Vinnie Jr.,' because of their respective genders" (*Id.*, ¶ 22 [c]); and (4) "is deviant or made sexual advances to Slaton" (*Id.*, ¶ 22 [j]). Defendants counter that the statements in the Book constitute non-actionable opinion, are not defamatory, and are substantially true.

Standard for Defamation Action

To establish a cause of action for defamation, plaintiff must demonstrate the following elements:

1) a false statement on the part of the defendants concerning the plaintiff;

2) published without privilege or authorization to a third party;
3) with the requisite level of fault on the part of the defendants; and
4) causing damage to plaintiff's reputation by special harm or defamation per se

(See Restatement [Second] of Torts § 558; Dillon v City of New York, 261 AD2d 34, 38 [1st Dept 1999].)

CPLR § 3016(a) requires that the alleged false and defamatory words be specified with particularity in the complaint. The complaint must also allege the "time, place and manner of the false statement and to specify to whom it was made." (*Dillon*, 251 AD2d at 38 [citations omitted].)

"Since falsity is a *sine qua non* of a libel claim and since only assertions of fact are capable of being proven false, we have consistently held that a libel action cannot be maintained unless it is premised on published assertions of fact." (*Brian v Richardson*, 87 NY2d 46, 51 [1995]). "Expressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation." (*Mann v Abel*, 10 NY3d 271, 276 [2008]).

Distinction between Assertions of Opinion and Facts

In the leading case of *Steinhilber v Alphonse* (68 NY2d 283 [1986]), the Court of Appeals articulated the standard for distinguishing between fact and opinion as follows:

> "A 'pure opinion' is a statement of opinion which is accompanied by a recitation of the facts upon which it is based. An opinion not accompanied by such a factual recitation may, nevertheless, be 'pure opinion' if it does not imply that it is based upon an undisclosed fact. When, however, the statement of opinion implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it, it is a 'mixed opinion' and is actionable. The actionable element of a 'mixed opinion' is not the false opinion itself – it is the implication that the speaker knows certain facts, unknown to his audience, which support his opinion and are detrimental to the person about whom he is speaking."

(*Id.* at 289-290 [citations and footnote omitted].)

This legal determination is quite a complex balancing act as "even apparent statements of fact may assume the character of statements of opinion, and thus privileged, when made in public debate, heated labor disputes, or other circumstances in which the audience may anticipate [the use] of epithets, fiery rhetoric or hyperbole." (*Steinhilber*, 68 NY2d at 294 [citations omitted].) With this in mind, the proper inquiry is, "whether the reasonable reader would have believed that the challenged statements were conveying facts about the . . . plaintiff." (*Brian v Richardson*, 87 NY2d 46, 51 [1995], quoting *Immuno AG v Moor-Jankowski*, 77 NY2d 235, 254 [1986].)

To determine what constitutes an opinion or an objective fact, the court considers the following factors:

> "(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal ... readers or listeners that what is being read or heard is likely to be opinion, not fact. It is the last of these factors that lends both depth and difficulty to the analysis."

(*Brian*, 87 NY2d at 51 [internal quotation marks and citations omitted]). "[I]n distinguishing between actionable factual assertions and nonactionable opinion, the courts must consider the content of the communication as a whole, as well as its tone and apparent purpose." (*Id.*) The court may not "sift[] through a communication for the purpose of isolating and identifying assertions of fact," but rather, it is required to "look to the over-all context in which the assertions were made and determine on that basis 'whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff.'" (*Id.*)

(internal quotation marks and citations omitted). In addition, "the courts are required to take into consideration the larger context in which the statements were published, including the nature of the particular forum." *(Id.)*

Slaton's Belief that Plaintiff is her Father is Non-Actionable Opinion

In this case, "the autobiographical nature of the book" suggests that the statements contained therein were opinion, even if, "viewed in isolation, [they] could be found to convey factual assertions." *(Dworin v Deutsch*, 2008 WL 508019, *4, 2008 US Dist LEXIS 13655, *12 [SDNY Feb. 22, 2008]; *see also Goetz v Kunstler*, 164 Misc 2d 557, 564 [Sup Ct, NY County 1995]) ("[t]he autobiography in general and the statements about Goetz in particular are written from a subjective, rather obvious, point of view and do not purport to be anything else"). The authors in the Book make it clear that, in forming opinions, Slaton relied on her "gut," "instincts," and "intuition." (Exhibit "B" to the Balin Aff., Book at 13, 43, 51, 145). These statements support the conclusion that the "larger context" of the autobiographical Book stated only "personal opinions." *(Brian*, 87 NY2d at 51; *Behr v Weber*, 172 AD2d 441, 443 [1st Dept 1991]) ("phrases such as 'I think' and 'I feel' . . . indicated that she was stating her personal opinions").

Moreover, the content of the Book as a whole does not suggest that the alleged defamatory statements constitute factual assertions. Rather, the autobiographical portion of the Book involves Slaton's personal search for her biological parents, and her effort to discover whether she is the product of incest, as Slaton was allegedly informed by her biological mother. (*Id.*, Book at 2). Slaton concedes in the Book that she never discovered the answer to this question. (*Id*,. at 145) ("[m]aybe her [Priscilla's] father did rape her. I have no idea"); (*Id.*, at

150) ("I wanted to rule out the specter of my birth mother's nasty insinuation altogether"). Given that Slaton left open the possibility that Slaton's grandfather was her father, it is quite clear that the authors in the Book could not have stated that plaintiff was Slaton's father as an assertion of fact.

It is alleged in the Book that plaintiff "acknowledged [Slaton] as his biological daughter" (*Id.*, Book at 147), Slaton had "a relationship with [her] birth father, sort of" (*Id.*, at 148), and plaintiff said, "I know who you are. You're my daughter" (*Id.*, at 146). Plaintiff denies making these statements and faults Slaton for failing to disclose in the Book that he denied paternity.

As a preliminary matter, although Slaton stated in the Book that plaintiff acknowledged paternity, Slaton later in the Book recorded that plaintiff effectively disavowed his prior paternity acknowledgment. Specifically, Slaton subsequently states in the Book that plaintiff "started backpedaling a little on whether or not [Slaton] was actually his biological daughter," that "he simply couldn't say for sure," and that, "a year ago, the old nagging doubt came back again," and Slaton "decided she wanted to know once and for all if Vinnie was [her] biological father" (*Id.*, 149.)

Simply stated, Slaton did not base her paternity opinion on this purported acknowledgment. According to Slaton, her relationship with plaintiff was "what [she] needed at the time," and "[i]t was such a relief to know the sordid story my birth mother told me wasn't true . . . ." (*Id.*, at 148). When viewed in "the over-all context in which the assertions were made," it is clear in the Book that plaintiff does not acknowledge paternity, and that any statements concerning plaintiff's paternity were merely speculation, and not assertions of fact. *(Brian*, 87 NY2d at 51).

Slaton states in the Book that DNA testing "is generally conclusive, but that's not a perfect science, either. It is my own intuition that helps me solve my cases" *(Id.*, at 51). Slaton then reports that the DNA tests of Slaton and plaintiff yielded "'Inconclusive'" results, that the DNA test administrators "were totally incompetent," and that she "didn't trust their results." *(Id.*, at 150). Slaton opines that she did not "need the scientific evidence" because, "[w]ith every pore of [her] being, [she] now feel[s] like Vinnie must be [her] birth father." *(Id.)* Plaintiff himself is alleged to have stated: "I don't care about the DNA test." *(Id.*, at 154). Slaton concludes the eighth chapter of the Book stating: "The DNA test means nothing to me now, because I know the blood tie is real. I still don't know exactly where my birth father fits into my life. It's something adoptees struggle with for years. I just hope Vinnie sticks around long enough for me to figure it out." (*Id.*, at 156). As such, it is clear from the Book that the DNA tests did not confirm plaintiff's paternity, and that Slaton was not relying on conclusive, scientific evidence. To the contrary, any suggestion of paternity is based upon plaintiff's opinion and her feelings, and not on assertions of fact.

As discussed above, added to the matrix of the speculative factual scenarios presented in the Book is the possibility that Slaton's mother, Priscilla, was raped by Priscilla's father, making Slaton the product of incest. (*Id.*, at 145). Slaton in the Book never proclaims to resolve the issue of paternity. To the contrary, the context and language of the alleged defamatory statements are tailored to circumscribe a precise answer to the question of paternity, which appears to have been deliberately designed to dramatize the "mystery" of Slaton's parentage and create a narrative arc for the autobiographical portion of the Book, thereby constituting mere "opinion based on speculation." (*Levin v McPhee*, 119 F3d 189, 197 [2d Cir 1997]) (conflicting

and inconsistent "accounts of what either did or might have happened" constituted "opinion based on speculation without any implication of fact").

Furthermore, having disavowed the DNA tests, the authors in the Book disclose the bases for Slaton's purported statement that plaintiff is her father, as follows:

> "The more I get to know him, the more I see what we have in common. We share the same warped sense of humor. We don't pull any punches. We have the same no-BS style. Good or bad, people always know where they stand with us. On some strange level, we get each other."

(*Id.*, at 150). In the Book, Slaton also states that "Vinnie was being fatherly" (*Id.*, at 152), that it was a "defining moment" when Slaton "realized this guy [plaintiff] was the only person on earth who'd known [her] as a baby" (*Id.*, at 154, 157), that plaintiff and Slaton's son "have the same wavy dark blond hair" (*id.* at 148), and that "Vinnie . . . is all about feeding the ones he loves—another sign we are related" (*Id.* at 150). Thus, to the extent that the alleged defamatory statements could be construed as attributing paternity to plaintiff, any such hypothesis "is accompanied by a recitation of the facts on which it is based," including Slaton's disavowal of scientific DNA evidence, and, therefore, her hypothesis "is readily understood by the audience as conjecture." *(Gross v New York Times Co.*, 82 NY2d 146, 154 [1993]).

In short, while plaintiff selects certain statements in the Book suggesting that both plaintiff and Slaton acknowledged that plaintiff was Slaton's biological father, the full context of the communication signals readers that what is being read is likely to be opinion, not fact. *(Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 380-381 [1977]) ("[p]laintiff may not recover from defendants for simply expressing their opinion . . . , no matter how unreasonable, extreme or erroneous these opinions might be"). Accordingly, the alleged

defamatory statements in Book concerning plaintiff's alleged paternity constitute non-actionable opinion.

Remaining Statements Are Also Not Defamatory

The remaining statements alleged in the First Amended Complaint are also not defamatory. The sole discernible basis for Slaton's reference to plaintiff as in "the mob" (*Id.*, Book at 146) is plaintiff's purported telephone call with Slaton, where he stated: "This is Big Vinnie. I hear you're lookin' for me." (*Id.*, at 145). "[C]harging plaintiff with a serious crime" can constitute defamation per se. *(Liberman v Gelstein*, 80 NY2d 429, 435 [1992]). Here, however, Slaton does not seriously claim that plaintiff is in "the mob," but rather she appears to be referring to the nickname, "Big Vinnie," and perhaps the dialect form, "lookin'," to create a "mob" caricature. Thus, the reference in the Book to "mob" could not reasonably be seen as stating facts. *(Hustler Mag. v Falwell*, 485 US 46, 57 [1988]) (no recovery for ad parody that could not reasonably been seen as stating facts); *(see also Weiner v Doubleday & Co.*, 142 AD2d 100, 105 [1st Dept 1988] *affd* 74 NY2d 586 (1989) (there can be no action for libel based upon opinion, expressed in the form of "epithets").

There are no statements in the Book that can be construed that plaintiff made "sexual advances" towards Slaton. (First Amended Complaint, ¶¶ 4, 22 [j]). Slaton only stated that plaintiff made "inappropriate" and "tasteless remarks." (*Id.*, Book at 149). These statements are "the sort of subjective moral evaluation[s] that readily fall[] within the ambit of what the average reader would understand to be the author's 'opinion' rather than fact." *(Chalpin v Amordian Press*, 128 AD2d 81, 84 [1st Dept 1987]) (statement "that plaintiff is 'an unbelievably unscrupulous character'" held to be non-actionable opinion); *(see also Kane v Comedy Partners*,

2003 WL 22383387, *9, 2003 US Dist LEXIS 18513, *25-26 [SDNY Oct. 16, 2003] *aff'd* 98 Fed Appx 73 (2d Cir 2004) (stating that "'rhetorical hyperbole' and 'vigorous epithets'" are expressions of opinion, and "use of the word 'offensive'" held to be nonactionable "expression of opinion"), Plaintiff also claims that various statements in Book "impute to Plaintiff sexual promiscuity and misconduct." (First Amended Complaint, ¶¶ 4, 22 © and (e), 27). Plaintiff admits that he had a relationship with Slaton's mother. (First Amended Complaint, ¶ 2). The only other relationship mentioned in the Book involving plaintiff is his relationship with "Vinnie Jr.'s" mother, which is not raised or disputed in the pleading (*Id.*, Book at 147; First Amended Complaint, ¶ 22 [c] and [e]), other than to admit that plaintiff "[n]ever married" and "fathered one male child out of wedlock . . . ." (Plaintiff's Opp Brief at 30; First Amended Complaint, ¶ 23 (j) and (k); Affidavit of Vincent Oleniak, Sr., sworn to on August 23, 2013, at ¶ 7; Affidavit of Vincent Oleniak, Jr., sworn to on August 22, 2013, at ¶ 3; Affidavit of Nadia Oleniak, sworn to on August 22, 2013, at ¶ 3). The authors in the Book do not describe either relationship as involving promiscuity. Thus, any claim of promiscuity based upon these two relationships, or that plaintiff fathered a child out of wedlock, is undermined by the substantial truth of these claims. *(Shulman v Hunderfund*, 12 NY3d 143, 150 [2009] *quoting Masson v New Yorker Magazine, Inc.*, 501 US 496 [1991]) (libel "'overlooks minor inaccuracies and concentrates upon substantial truth'"); *Fulani v New York Times Co.*, 260 AD2d 215, 216 [1st Dept 1999]) (inaccurate statement not actionable where it "could not have had a different or worse effect on the mind of a reasonable reader than the truth").

Significantly, the First Amended Complaint fails to identify any specific references to promiscuity or sexual misconduct. *(Bement v N.Y.P. Holdings*, 307 AD2d 86, 92 [1st Dept

2003]) ("vague and/or ambiguous" claims concerning "unchaste behavior" is not defamatory); (43A NY Jur 2d Defamation & Privacy § 30) ("[i]n order to be actionable, charges of unchastity must contain specific references to sexual misconduct; imputations that are merely suggestive are not sufficient"). Merely stating that plaintiff "never married" and had "an old shoe box . . . full of pictures . . . of various women" (First Amended Complaint, ¶¶ 22 [c] and [e]; Book at 147) is not "an actionable imputation of unchastity." *(Morrow v Wiley*, 73 AD2d 859, 859 [1st Dept 1980]); *(see also James v Gannett Co.*, 40 NY2d 415, 420 [1976]) (statement "Men is my business" did not "impute unchastity or prostitution" to the plaintiff belly-dancer, where the purported "business" did not "involve acts of illegality or promiscuity"). For the same reason, the statements in the Book that plaintiff "was such a player," and that Slaton's mother "was one in a string of Vinnie's conquests" (First Amended Complaint, ¶ 22 [e]; *Id.*, Book at 147), constitute the authors' subjective and speculative opinions, without ever purporting to convey facts of plaintiff's promiscuity or sexual misconduct. *(James*, 40 NY2d at 420; *Morrow*, 73 AD2d at 859; *Chalpin*, 128 AD2d at 84).

Plaintiff "asserts that Plaintiff abandoned her or permitted her to be adopted because she is female," is defamatory. (First Amended Complaint, ¶¶ 4, 22 [c]). These allegations are based upon the following statement in the Book:

> "Vinnie never married. He was one of these guys who could never commit. And yet he did do right by his son, Vincent, another child he had out of wedlock (I am assuming there are only three of us). When he was just a young boy, Vincent's mother died of cancer. Vinnie finally stepped up to the plate as a father and took him in."

(*Id.*, Book at 147). However, nothing contained in the quoted passage suggests that plaintiff acted based upon his son's gender. Rather, the passage expressly attributes plaintiff's behavior to

the fact that "Vincent's mother died of cancer," which is not actionable. *(Aronson v Wiersma*, 65 NY2d 592, 594 [1985]) ("if [the words are] not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction"). Furthermore, Slaton's speculation as to why "Vinnie finally stepped up to the plate as a father and took him in" (*Id.*, at 147) is "not readily verifiable and . . . therefore intrinsically unsuited as a foundation for defamation." *(Goetz*, 164 Misc 2d at 564; *see also Rinaldi*, 42 NY2d at 382) ("inquiry into motivation is within the scope of absolute privilege").

Conclusion

Accordingly, it is hereby

ORDERED that the motion of defendants is granted to the extent of dismissing the First Amended Complaint in its entirety. The foregoing constitutes the decision and order of this Court.

Dated: May 21, 2014

ENTER:

J.S.C.

SHLOMO HAGLER
J.S.C.